VCEA

Virginia Coal and Energy Alliance, Inc.

April 9, 2018

VIA E-MAIL SUBMISSION

Karen G. Sabasteanski
Department of Environmental Quality
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Re: Comments of the Virginia Coal and Energy Alliance
"Regulation for Emissions Trading Programs"
9VAC5-140-6010 through 9VAC5-140-6430

Dear Ms. Sabasteanski:

The Virginia Coal and Energy Alliance ("VCEA") appreciates the opportunity to comment on the proposed regulation entitled "9VAC5-140. Regulation for Emissions Trading Programs (adding 9VAC5-140-6010 through 9VAC5-140-6430)" (hereinafter, the "CO_2 Trading Rule"). VCEA opposes the CO_2 Trading Rule because it would establish a trading program for carbon dioxide emissions with the intent of entering Virginia into the Regional Greenhouse Gas Initiative ("RGGI"), even though doing so would significantly and unnecessarily burden our coal and energy industries without providing any real benefit to the Commonwealth or its citizens.

Background

VCEA[1] is the voice of the coal industry in Virginia. Its membership consists of companies that operate in and around Virginia's coalfields and whose business depends in one way or another on coal extraction and distribution within the state. As part of its mission, VCEA seeks to identify and respond to any proposed regulatory changes that would impact how its members do business. Since the CO_2 Trading Rule would directly apply to and negatively impact our members, VCEA has a significant interest in the proposal.

Nationwide, domestic minerals production provides critical benefits to the U.S. economy. Mining provides essential power and materials for nearly every industry and consumer product and supplies low-cost, reliable fuel for homes and businesses across the country. The mining industry is also an important employer and economic engine both nationwide, and in the Virginia coalfields in particular. The mining industry accounts for more than five percent of the

[1] VCEA was formed in January 2014 by way of a merger of three existing state coal associations: the Virginia Coal Association, the Eastern Coal Council and the Virginia Mining Association. Thereafter, the Virginia Mining Issues Group was also merged into, and subsumed by, the VCEA.

workforce in Virginia. It represents nearly 12 percent of the Southwest Virginia region's total wages, and in the past 10 years, the industry has paid more than $320 million in severance taxes, accounting for more than nine percent of the total tax revenues collected in Southwest Virginia. These funds are a critical source of financial support for the region's road, water, and sewer infrastructure and also supports regional economic development efforts.

The CO_2 Trading Rule Will Provide No Benefits

The benefits provided by the coal and coal-related industries should only be placed at risk if the justification for doing so is clear—that is, if the benefits from the burden placed on those industries are greater than the benefits they provide. Unfortunately, the justification provided for the CO_2 Trading Rule is anything but clear, as it unfairly compares an underestimated assessment of real-world local costs and economic impacts to a theoretical and now-rejected overestimate of global benefits.

As an initial matter, the justification proffered for the CO_2 Trading Rule contains a logical disconnect that illustrates well the critical flaw underlying the policy behind the proposal. The justification, which is based on the Report of the Executive Order 57 Work Group, proceeds as follows: (1) climate change causes certain harms in Virginia (*e.g.*, heavy storms, water shortages, and warmer temperatures); (2) therefore, reducing the greenhouse gas emissions in Virginia will reduce those harms and benefit the Commonwealth. However, that justification merely *assumes* that reducing CO_2 emissions from the Commonwealth will address harms here. Contrary to that assumption, reducing emissions in Virginia will not have any impact on the earth's climate. Emissions from Virginia, and indeed the entire United States, are such a small portion of total global emissions that any reductions are almost certain to have no meaningful effect at all.

In truth, the benefits alleged in support of the CO_2 Trading Rule are based almost entirely on the highly controversial "social cost of carbon," a metric crafted by a now disbanded interagency working group under the Obama Administration. The Trump Administration has, of course, rejected that metric and the analysis underlying it, and thus directed that it no longer be used to justify any federal regulations. But even the social cost of carbon analysis itself admits a critical point—"[e]ven if the United States were to reduce its greenhouse gas emissions to zero, that step would be far from enough to avoid substantial climate change." That admission confirms that even those in favor of drastic climate change policies must recognize that the reductions from any one country, much less any one region or individual state, will not change anything or benefit anyone.

Moreover, the social cost of carbon itself is internally flawed because it relies on a highly speculative evaluation of global benefits, followed by an unfair comparison of those world-wide benefits to domestic costs incurred within the United States alone. Not only is that comparison highly unreasonable, since worldwide benefits will always dwarf the costs incurred by a single nation, it also represents a significant break from the manner in which the impact of regulations has always been evaluated. In the past, U.S. costs have always been compared to U.S. benefits in order to provide a fair basis for the comparison, even for regulations that may have the potential to result in benefits to other countries. With the withdrawal of the social cost of carbon from federal policy, all federal agencies must now return to that more reasonable and well-understood approach, and DEQ should do the same.

The only other justification for the proposed regulation relies on what has often been referred to as "co-benefits"—*i.e.*, benefits that are not the intended purpose of the rule or the authority underlying it. Here, the "co-benefits" asserted are those associated with reductions in the emission of other pollutants, such as nitrogen oxides, sulfur dioxide, and particulate matter, which can degrade air quality in a way that directly impacts human health (unlike CO_2).

However, those "co-benefits" are not a reasonable basis upon which to justify the CO_2 Trading Rule because the other pollutants identified are already well-controlled by other Clean Air Act programs. Currently only a small sliver of the northeast corner of the Commonwealth is in nonattainment for ozone, due to its proximity to the Washington D.C. metropolitan area, not emission sources located in Virginia, and sufficient rules are in place to address the air quality concerns in that area. The rest of the state is already in full compliance with the standards that EPA has set to protect public health (with an adequate margin of safety), and thus no further reductions are needed to maintain compliance with those standards. Therefore, claiming that additional reductions in other pollutants as a justification the proposed CO_2 Trading Rule amounts to a "double-counting" of air quality benefits already achieved (and paid for) by the Commonwealth and its citizens.

The CO_2 Trading Rule Will Result in Significant Costs

Although the proposed rule would adopt a seemingly small 3% per year reduction, those compounding reductions will in fact be more significant than the analysis suggests because it ignores, and in essence prohibits, any growth in emissions that would otherwise occur. Whereas the supporting analysis underlying the proposed rule claims a reduction of 30% (from 33-34 million tons in 2020 to 23-24 million tons in 2031), in effect it will actually require reductions of nearly 50%, when compared to what would otherwise occur without the program (40-50 million tons). The result will be a significant increase in the cost of electricity in the Commonwealth of over 7% and present a significant burden on the coal and coal-related industries, as noted in VCEA's comments on the Clean Power Plan, a relevant portion of which is provided below:

> Virginia will be one of the hardest hit states, with a 32% reduction in carbon intensity required by 2020. Attempting to achieve this reduction will require a significant re-engineering of electricity in Virginia, and a significant re-dispatching of coal to natural gas. …
>
> In fact, the Virginia State Corporation Commission (SCC) has determined that the CPP will "increase substantially the bills and rates Virginians pay for their electricity, and could impact significantly the reliability of the electrical service they receive." …

The assertion that emission reductions of a similar magnitude under the proposed CO_2 Trading Rule will have only a minimal impact on the economy of the Commonwealth is thus quite difficult to believe.

To combat concerns about the potential impacts to the economy and the cost of electricity, an analysis was prepared by the proponents of the rule to focus on individual utility bills. The conclusion of that study suggests that the impact to ratepayers will be minimal, at just a few dollars on each bill. However, if that is in fact the case, it must mean the analysis assumes the proposed regulation will not significantly affect the market; that is, the study must have assumed that the market itself would likely encourage nearly the same emission-reducing behavior, based solely on the demand for and supply of energy. But if that is true, then the proposed trading regulation would not really be responsible for any of the emission reduction benefits claimed. The supporters of the CO_2 Trading Rule cannot have it both ways—either the program will require significant emission reductions that would not otherwise occur under existing market forces, in which case significant costs will be incurred in working against the market, or else the market would already encourage the reductions now sought via regulation, in which case the regulation is essentially unnecessary.

The CO_2 Trading Rule Lacks Statutory Authority

Notably, the General Assembly has already decided that the CO_2 Trading Rule is not in the best interest of the Commonwealth by passing a law (HB 1270) to prohibit the very type of program contemplated by the proposed regulation. Nevertheless, the Governor vetoed the law and is charging ahead via executive fiat to establish such a program anyway.

This scenario is remarkably similar to what has just transpired at the federal level. Despite the fact that the U.S. Congress rejected many repeated efforts over more than a decade to enact a climate change trading program, the Obama Administration decided to establish one anyway purely through executive authority by issuing the Clean Power Plan, which was based on just a few ambiguous and highly general sentences of the Clean Air Act. So too here, given that the authority claimed by the Attorney General as the basis of the proposed trading regulations is merely the general authority "to promulgate regulations, including emergency regulations, abating, controlling and prohibiting air pollution."[2]

The Clean Power Plan is currently stayed by the Supreme Court and, although the Court did not address the merits of the Clean Power Plan in its stay decision, it did reject another climate change regulation on the following basis:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.[3]

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[2] Section 10.1-1308 of the Code of Virginia.
[3] *UARG v. EPA*, 134 S. Ct. 2427 (2014).

In short, legislatures grant bold powers in clear terms, and executive agencies should not try to invent bold powers out of ambiguous language. This general principle, often referred to as the "clear statement rule," should have equal effect at the federal and state levels, since both governments are based on the same fundamental principle—the legislative branch makes the laws, and the executive branch wields only the authority granted to it by the legislature.

Nothing in the federal Clean Air Act clearly authorized EPA to issue the Clean Power Plan—largely a carbon trading program in highly creative disguise—and that is likely why the Supreme Court stayed it. Those same concerns appear relevant to the trading regulations now proposed for Virginia, but perhaps to an even greater extent. Unlike the U.S. Congress, which has simply been unable to pass a climate change bill, the Virginia Legislature did pass one, but one that prohibits precisely what the executive branch is now trying to do on its own.

That executive action is only legal if the legislature has already authorized such a program in a previous statute, but it did no such thing. Rather, the statute claimed to be the underlying authority for the proposed trading regulation is the same type of highly general authority found in the Clean Air Act and likely in the code of every other state in the nation. Such general grants of authority to issue regulations to address air pollution provide no clear authority for the dramatic policy shift the Governor seeks to implement, which clearly represents a decision of economic and political significance. The Governor should not invent that authority, particularly in light of the "clear statement" to the contrary recently made by the legislature.

Conclusion

In summary, the proposed trading regulations will be harmful to the critical coal and energy industries in the Commonwealth, will provide no real benefits to its citizens, and stretches too far the authority upon which it is supposed to be based. Thus, VCEA opposes the regulation and asks DEQ to abandon it in its entirety.

Sincerely,

Harry D. Childress
President